Supreme Court, U.S.
FILED

No. 021693 MAY 14 2003

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In the Supreme Court of the United States

TRI, Inc.,

Petitioner,

vs.

Boise Cascade Office Products, Inc., and Honeywell, Inc.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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82 pp

QUESTIONS PRESENTED

Does a court err in ruling that the prior lawsuit of a former employee against his employer, alleging race discrimination, is a "legitimate, nondiscriminatory" reason for the employer's refusal to deal with a minority-owned company founded by the former employee?

Does a court err in interpreting *Matsushita Elec. Indus. Co. v. Zenith Radio Corporation* to require a "rational economic motive" for an antitrust violation where the defendant admits to a non-economic motive driving its dealings with the plaintiff?

Does a court err in interpreting *Matsushita Elec. Indus. Co. v. Zenith Radio Corporation* to preclude liability for an antitrust violation motivated by race discrimination and retaliation, based on the absence of a rational economic motive?

Does a court depart from the accepted and usual course of judicial proceedings in granting a defendant's motion for summary judgment on the basis of an affidavit, submitted with defendant's reply brief, of a witness: 1) undisclosed as having the expertise alleged in the affidavit, and 2) providing testimony flatly contradicting the prior deposition testimony of defendant's witnesses?

Does a court depart from the accepted and usual course of judicial proceedings in granting a defendant's motion for summary judgment where the defendant and its attorney engaged in a course of conduct obstructing the plaintiff's discovery of relevant evidence, including an instruction to a key witness to destroy documents *subsequent to* the initiation of the lawsuit and *subsequent to* defendant's identification of the witness as "likely to have discoverable information"?

CORPORATE DISCLOSURE STATEMENT

Petitioner hereby identifies all its parent corporations and lists all publicly held companies that own 10% of more of petitioner's stock:

TRI, Inc. has no parent corporation.

There is no publicly held company that owns 10% or more of TRI, Inc.'s stock.

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The district court opinion is reported at 2001 U.S. Dist. LEXIS 17800.

JURISDICTIONAL STATEMENT

The judgment of the Eighth Circuit Court of Appeals was entered on January 8, 2003. The Court of Appeals entered an order on February 13, 2003, denying a timely petition for rehearing and petition for rehearing en banc. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

42 U.S.C. § 1981
15 U.S.C. § 1

STATEMENT OF THE CASE

Petitioner TRI brought this case against respondents Boise Cascade Office Products, Inc. and Honeywell, Inc., claiming violations of 15 U.S.C. § 1 (Sherman Antitrust Act) and Minnesota Statute § 325D.51; race discrimination in violation of §42 U.S.C. 1981 and the Minnesota Human Rights Act, § 363.03; and tortious interference with existing and prospective business relations. The district court granted respondents' motions for summary judgment on all of the petitioner's claims. While the petitioner in this case is Tonerecycle, Inc. (TRI), a minority-owned business that manufactures recycled printing cartridges, the respondents' justification for their actions centers on an individual, Joseph Thomas. Thomas is an electrical engineer and a former Honeywell employee, having worked for Honeywell for 16

years. In 1990, Thomas was the Director of Manufacturing Operations for Honeywell's Solid State Electronic Center (SSEC). He was terminated that year and brought a lawsuit against Honeywell for race discrimination and defamation.[1]

In 1991, along with four business partners, Thomas formed the company, TRI. From its inception, part of the company's mission has been to employ inner-city residents. Thomas's experience of being unemployed inspired him to hire a workforce from the traditionally underemployed sector of society. In an article published in 1996 in Minnesota Business, Thomas explained this company goal:

> Everyone has talents. My biggest skill is getting others to realize theirs and how to use them. Now in my employees I can see groups of people, who otherwise might be on the streets somewhere, accomplishing things and feeling good about themselves. I'm in business to create jobs.

By 1995, TRI had a core group of long-term employees. By 1998, it employed 55 employees. From 1991 to 1998, TRI's sales grew from zero to $3.14 million.

TRI began its relationship with Boise Cascade Office Products (Boise), according to Boise testimony, in 1995 or 1996. Bill Souvignier, district sales manager for Boise, was "sold on the fact that [the TRI product] would be good for [Boise's] customers." He explained:

> Through a series of conversations, meetings, and I don't recall how many, but I was led to believe that TRI had, first of all, people involved in the operation that were very heavy in their engineering background and in their quality

[1] The record of the lawsuit included facts that revealed a falsified investigation of charges that Thomas had sexually harassed a female employee. The court dismissed the race discrimination as untimely, and the jury found for Thomas on the defamation claim, though the substituted judge reversed the pretrial ruling by the court denying Honeywell's claim of qualified priviledge, and the jury did not find for Thomas on the issue of malice.

> control background, and our experience with toner cartridges had not been – remanufactured toner cartridges – had not been really positive up to that point. So as they continued to talk about their quality and show us reports, I became convinced that if anyone could put a good cartridge together, these were the people with the background.

By October 1998, TRI had become Boise's "minority supplier toner offering in the Twin Cities." Souvignier explained that Boise would invite TRI to make presentations to customers and take TRI representatives with them on sales calls to customers. According to Souvignier, Boise was "trying to open doors" for TRI in order for TRI "to get some exposure to the decision makers at various companies." Souvignier also remembered "situations where Boise would invite TRI to products shows, Pillsbury for example." Souvignier testified that up until the time of October 1998, Boise's sales of TRI had had "some substantial sales growth." In July of 1998, Boise presented to U.S. Bancorp a proposal for a national contract with Boise for the sale of TRI printing cartridges to Bancorp. In that proposal, Boise stated that TRI was a company with which it "contracted." According to the Bancorp proposal, Boise's "annual purchase volume" of TRI products was $585,000. In September of 1998, Ron Armant, as vice president of TRI, received an invitation to be a guest presenter at the Boise quality council meeting in Minneapolis on November 5, 1998.

The November 1998 issue of Recharger magazine, the office products recycling industry's major trade journal, presented the results of a survey of the reported revenues of remanufactured toner cartridge companies. The survey indicated that only 3% of remanufactured toner cartridge companies reported revenues of more than $3 million in 1997. TRI's 1997 revenues were $3.1 million. In the March 1999 Recharger issue, the trade magazine set the average rate of defect for recycled cartridges at 3.05 %. TRI's defect rate at

the time, according to the Bancorp proposal prepared by Boise on July 22, 1998, was 0.87%.

In February of 1998, Respondents Honeywell and Boise entered into a Proprietary Master Agreement Purchase of Office Products. An intracorporate Honeywell memo dated February 24, 1998 stated:

> We are please to announce that Honeywell has entered into a North American Agreement with Boise Cascade Office Products to serve as Honeywell's strategic supplier of office products. . . .The move to a single supplier of office products brings a number of benefits to Honeywell.

Paul Ruffin, MWBE development manager for Boise, explained that the benefit for the organization who "got on the national account program" was a "kind of a one-stop deliverable shop for them" and "the number one benefit of a shared wallet." Helen Kimbrough, senior buyer and small business liaison officer for Honeywell, testified that she and representatives of Honeywell from different locations nationally were involved in negotiations for nine months to a year before the contract was signed. For Boise, David Plantan, national accounts manager, and Bruce Moss, general manager, were responsible for the negotiations leading up to the agreement. Plantan signed the agreement on behalf of Boise. Part of the negotiations involved setting the prices that Honeywell would pay for the products purchased from Boise.

Beginning in early 1998 or late 1997, Armant began discussing with Kimbrough the possibility of TRI doing business with Honeywell. Armant did a presentation along with three other minority vendors for Kimbrough and two or three other people from Honeywell's purchasing department. Following that meeting, Armant talked with Souvignier and then he began to talk to Boise's representative for Honeywell and began to get information to Kimbrough about how TRI could support a national program for Honeywell through Boise, as a part of the Boise office supply contract with

Honeywell. Armant then met with Boise's management and talked extensively about the opportunity to sell to Honeywell and about opportunities to support national programs with Boise. In addition to Honeywell and U.S. Bancorp, TRI also "targeted" a few other accounts for the possibility of a national relationship.

As of September 1998, TRI had provided all the information that Honeywell had requested and was waiting to hear if Honeywell and Boise would go forward with TRI's part of their national agreement. There was a meeting in Phoenix on October 15, 1998, at which Boise did a presentation to Honeywell, and as part of the presentation, Boise discussed its minority vendors. Armant met with Kimbrough and Ruffin in Miami on the 19th or the 20th, and they talked about the meeting in Phoenix and told Armant that "the deal was done" and Honeywell and Boise were going forward with the national contract for TRI. Armant recalled Kimbrough congratulating Ruffin for "doing a good job" at the meeting, which both Kimbrough and Ruffin said went "very, very well." Kimbrough, Ruffin and Armant were all "excited and happy," and Armant came back to Minneapolis very enthusiastic about the national contract with Boise. Securing one national program was an important first step that would allow TRI to expand into multiple national programs with Boise.

"On or about October 20, 1998," as stated by Honeywell in its interrogatory responses, "Mr. Schneider [commodity person for office products] contacted David Plantan of Boise Cascade Office Products, and advised him that Honeywell did not wish to be supplied with TRI products through Boise Cascade Office Products." Plantan's day planner lists October 19, 1998 as the date Schneider called him. Schneider, however, testified:

> The event where I gained knowledge of TRI, I believe, was at a presentation by Boise Cascade in downtown Minneapolis at the Radisson where one of their guys, I think it was Ron Armant, I believe,

gave a presentation with a host of other minority contractors on what they do.

The meeting at the Radisson was on November 5, 1998. When shown the agenda for that meeting, Schneider testified that he was "positive" it was after the meeting.

As for the substance of the call, Plantan testified as follows:

A. Again, he said that he doesn't want – he's not going to allow Honeywell to purchase TRI products. I'm paraphrasing, but it was very short, and it was directions that were given to me to end promoting TRI products to Honeywell.

Q. So he was giving you a direction?

A. That's correct.

Q. Was he clear about it?

A. Very clear.

Q. And that direction was, "Don't promote TRI products to Honeywell?"

A. That's correct.

Q. And based on your knowledge of who he was and the contacts you had with him at Honeywell, you felt that he had the authority to give you that direction.

A. Yes, I did.

Q. What did he tell you about the reasons for the decision or for the direction he gave you?

A. I know that we didn't discuss it. And I don't recall exactly if I asked why and he said, "You don't need to know," or if I never asked. Because I could tell I didn't want to know, or needed to know.

Q. How could you tell that?

A. Experience.

Q. Was there something in the tone of his voice that made you feel that way?

A. It's unusual to hear that from a customer. So, when you do hear it, I didn't want to know, frankly. So I didn't pursue it. And he made it very clear, either his tone or maybe a comment, that it's not something we can discuss.

Schneider testified that "the purpose of the call was to relay to Boise Cascade that Honeywell did not wish to have TRI products within, you know, delivered within Honeywell."

In his deposition, Ruffin offered his reaction to the phone call:

> I was curious, but I guess there was some sort of unwritten rule that something was going on that I didn't necessarily want to know about or want to be involved in. We were told by our supplier that we weren't going to go this route, we're going to go this route, and as a provider of their supplies and a significant customer that they were, we did what they said.

Plantan testified that on the morning of November 5, at a breakfast meeting prior to the Quality Council meeting in Minneapolis, he and Ruffin and Rivers and Kimbrough discussed the Honeywell-to Boise phone call, and "shared disappointment in the decision and the direction."

Following the Honeywell directive to Boise, the relationship between TRI and Boise abruptly changed. Boise stopped promoting TRI, not just to Honeywell, but overall. Following the phone call, TRI representatives never again went along with Boise on a sales call to a customer and never again were invited by Boise to do a presentation to Boise customers. There were no more proposals for national accounts. Also after the call, Boise drastically increased the prices of TRI products to Boise's high volume purchasers of

TRI, resulting in substantial declines in TRI sales. At all times, the cost of TRI's products to Boise stayed the same. Boise's minimum profit margin, upon petitioner's understanding, is required to be at 20%. Boise already had markups for TRI products above this minimum, but after the price increases, some of the markups were as high as 167%. According to the testimony of top Boise management, these price increases, beginning approximately one month following the Honeywell direction, were inexplicable, unjustifiable, against Boise's sales practices, against sound business practice, and against Boise's self-interest.

Bruce Moss, general manager for Boise in Minneapolis, testified:

> Q. Can you tell me what justifications, what reasons that you're aware of as general manager, would have supported those kind of price increases?
>
> A. I'm not aware of any. I have no idea what drove someone to raise the prices that way.
>
> Q. It doesn't look good to you?
>
> A. No, I don't like it.
>
> Q. Why don't you like it?
>
> A. Well, providing the data is correct, I'm not sure why that would have occurred. I don't know and – I don't know.

Thomas Van Hootegan, Boise's director of national accounts, with "overall responsibility for the sales and profitability of the national account program on a coast-to-coast basis," testified that only two factors "come into play" in determining price – "to maintain profitability and to maintain a competitive position in the marketplace." When asked about the reason for the drastic price increases of TRI products, Van Hootegan testified that he had "no idea."

Bruce Moss further testified:

Q. Would it be true that in setting a price for your customers, you wanted to set a price that would maximize the sale of the product at the profit margin that you had set?

A. I believe so.

Q. That's just a good sales strategy, isn't it?

A. Yes.

Q. If you underprice it you're going to lose profit, is that correct?

A. Yes.

Q. If you overprice it the market might go away?

A. Yes.

* * *

Q. In your experience as a general manager, your knowledge of the business, what do you believe the impact would have been on TRI with those accounts, with those kinds of price increases?

Mr. Harper: Same objection (foundation).

By Mr. Mavity:

Q. Impact on their sales.

A. Probably would have a pretty profound impact.

Q. In what way would it be profound?

A. They would more than likely stop buying the product.

Q. And that's because these price increases are such that they would cause those accounts probably to look elsewhere for a better price?

A. I would think so.

David Goudge, Boise's Senior Vice President of Marketing, testified:

> Q. In your experience, if a Boise customer found a particular item that they purchased regularly go up, let's say 59 percent, would it be likely that they might do some more shopping around to see if they could find a comparable item at a better cost?
>
> A. I think that's possible, yes.

One customer that did not have its prices for TRI products increased was Honeywell. Despite the Honeywell phone call (allegedly made to forbid the delivery of TRI products "within Honeywell"), the Minneapolis division of Honeywell, nevertheless, continued to purchase TRI and did so at the same prices Boise had set before the phone call.

Also following Honeywell's phone call, though the national account that Honeywell and Boise told Armant was a "go" never happened, TRI product code numbers called SKU's appeared in the ordering data bases for other Boise distribution centers around the country, making TRI products available for customers in other states to order. Once a manufacturer acquires a national account, Boise stocks the product in Boise warehouses in the states where the national account is located and places the SKU's in the national data base. As Goudge explained, if Boise and a national account, for example, Honeywell, were to reach an agreement to make a noncatalogue item available to the national account in that company's locations, the Boise distribution centers in those locations, "to be able to have their customer enter that item, had to create an item code in the item list." When the out-of-state customers ordered TRI products, however, Boise did not fill the orders, though it did not remove the SKU's from the database. Goudge testified,

> Q. Would you agree with me it could have – it would be a disincentive for people to reorder that product, correct?

A. People would probably not order the product when it came up temporarily out of stock all the time.

Q. And would you also agree that it could be a disincentive for a customer who had been ordering a TRI product to continue ordering if the product price increased by 59 percent?

A. Sure.

In March of 1999, less than five months after the Honeywell "direction" to Boise, Plantan attended an award ceremony to receive, on behalf of Boise, a "supplier of the year" award. Plantan testified that the award was "very significant," as Boise had only been a supplier to Honeywell since April of 1998, that Boise was very proud of the award, and that it would be "fair" to say that he was "responsible in large part for the success that Boise had with Honeywell."

In his deposition, Ron Armant, former vice president of TRI, described the sudden deterioration of the Boise-TRI relationship:

Q. As I understand the underlying accusation in this lawsuit, the basic accusation is that somehow Honeywell and Boise conspired to hurt TRI in some way. Do you know anything that you support that, any fact that would support that? Just from your own knowledge.

A. Yeah, from my own knowledge, other than the fact that TRI and Boise Cascade had a very, very good relationship up to a certain point, you know, sales growing, management and personnel that got along well and supported one another in their efforts to support their customers, you know, a history of four or five years of doing business together, and then all of the sudden the business slowed down substantially or stopped. No, not other than that.

ARGUMENT FOR GRANTING WRIT

I. The Eighth Circuit erred in ruling that the prior lawsuit of Joseph Thomas, a former employee of Honeywell, against Honeywell, alleging race discrimination, is a "legitimate, nondiscriminatory" reason for Honeywell's refusal to deal with TRI, a minority-owned company co-founded by Thomas.

The Eighth Circuit assumed that TRI had presented a prima facie case of discrimination by Honeywell, but held that Thomas's prior lawsuit against Honeywell was a "legitimate, nondiscriminatory" reason for Honeywell's refusal to deal with TRI. The lawsuit, however, included claims of discrimination based on race.[2] In *Robinson v. Shell Oil Company*, 519 U.S. 337 (1997), this Court held that an employer may not retaliate against a former employee for having complained of discriminatory termination. The Eighth Circuit's holding that a former employee's lawsuit alleging race discrimination is a "legitimate, nondiscriminatory" reason for an employer's refusal to contract with a minority-owned company owned by the former employee violates the spirit and the law of *Robinson*, and sets a precedent condoning an employer's reprisal for an employee's protected conduct.

---

[2] The Court of Appeals stated that there was "undisputed evidence" that the "decision-makers" did not know the lawsuit included claims of race discrimination; however, this finding is contrary to the record. Only Schneider testified that he did not know of the discrimination claim, but he further testified that he went to Honeywell's "legal department" with his recommendation about TRI. Plantan testified that Schneider was getting direction from someone in Honeywell, but he did not know from whom. Souvignier testified that someone "high up" in Honeywell had made the phone call. The record fails to indicate that any decision-maker besides Schneider was unaware of the race claim in Thomas's lawsuit, and the only evidence of Schneider's alleged lack of knowledge was his testimony. Moreover, due to all of the discrepancies between Schneider's testimony and Honeywell's answers to interrogatories and responses to requests for admissions, the evidence is far from undisputed that Schneider was a decision-maker.

In *Robinson*, the Court accepted the petitioner's and the EEOC's arguments that to exclude former employees from protection afforded individuals who have brought claims of discrimination would "effectively vitiate much of the protection afforded by § 704(a) [of Title VII.]:"

> According to the EEOC, exclusion of former employees from the protection of § 704(a) would undermine the effectiveness of Title VII by allowing the threat of postemployment retaliation to deter victims of discrimination from complaining to the EEOC, and would provide a perverse incentive for employers to fire employees who might bring Title VII claims. (Citations omitted). Those arguments carry persuasive force given their coherence and their consistency with a primary purpose of antiretaliation provisions: Maintaining unfettered access to statutory remedial mechanisms. (Citations omitted). The EEOC quite persuasively maintains that it would be destructive of this purpose of the antiretaliation provision for an employer to be able to retaliate with impunity against an entire class of acts under Title VII--for example, complaints regarding discriminatory termination. *Id.* at 346.

In the petitioner TRI's case, no inferences are required to prove that Thomas's lawsuit motivated Honeywell to refuse to deal with TRI years later, *for this is the reason Honeywell gave*. Thomas engaged in conduct protected by federal law, and based on that conduct, Honeywell refused to deal with the minority-owned company that Thomas later co-founded. Honeywell's decision hurt not only Thomas; it hurt Thomas's four business partners; it hurt TRI, the company they founded together; it hurt TRI's employees. The record showed that TRI, in addition to its minority ownership, had a mission to employ minority, inner-city residents who might not otherwise have jobs. The Eighth Circuit accepted as

"legitimate" and "nondiscriminatory" Honeywell's justification – Thomas's lawsuit claiming race discrimination – for refusing to do business with a minority-owned company employing minority individuals. TRI has found no other case in which a court has sanctioned such a justification. The Eighth Circuit's endorsement of Honeywell's motives in refusing to deal with TRI has the exact negative impact on discrimination law that this Court sought to avoid in *Robinson v. Shell Oil*. Granting Honeywell a license to "retaliate with impunity," the Eighth Circuit has sent a message that "undermines the effectiveness," and "is destructive of the purpose of the antiretaliation provision of Title VII." The court's holding – allowing the threat of postemployment retaliation to follow an individual for the rest of his life; to spill over onto his future company, his future partners, his future employees; and to sabotage his future business dealings – will deter victims of discrimination from ever complaining and, thereby, afford them less protection. This holding must not be the precedent in the Eighth Circuit.

II. The Eighth Circuit erred in interpreting *Matsushita Elec. Indus. Co. v. Zenith Radio Corporation* to require a "rational economic motive" for an antitrust violation where the respondent Honeywell admitted to a non-economic motive driving its dealings with TRI.

The district court and the Eighth Circuit panel held that petitioner did not articulate a rational economic motive for Honeywell to want to hurt TRI. Honeywell admitted that it was motivated by Joe Thomas's prior lawsuit against TRI. Honeywell characterized its "history" with Joe Thomas as "acrimonious." For the court to require some other motive was error. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), requires only that an antitrust plaintiff's theory be plausible, that it make sense. *Matsushita* does not impose an additional requirement upon the plaintiff, but merely confirms the summary judgment standard that the plaintiff's theory be sensible. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451,468 (1992) ("*Matsushita*

demands only that the nonmoving party's inferences be reasonable in order to reach a jury, a requirement that was not invented, but merely articulated, in that decision.")

Other circuits disagree with the Eighth Circuit that *Matsushita* directs a court to weigh the plausibility of direct evidence and thereby reject evidence because it is not rational. In *McLaughlin v. Liu*, 849 F.2d 1205 (9th Circuit 1988), the court explained that the *Matsutshita* plausibility requirement is applicable only to circumstantial evidence on which a party relies in seeking to avoid summary judgment. The court was clear that the plausibility standard does not apply to direct evidence, for example, testimony. As the court reasoned, to subject testimony to the *Matsushita* plausibility standard is to weigh the evidence and make credibility determinations – exactly what the court is not permitted to do in deciding a motion for summary judgment. In petitioner's case, not only did the respondent Honeywell offer testimony that it refused to do business with TRI because Thomas had previously sued Honeywell; the court accepted this evidence as true, basing its dismissal of TRI's § 1981 claim on this precise testimony. Yet, the court simultaneously rejected TRI's antitrust claim based on the absence of a plausible motive. The court explicitly required a "rational economic motive," placing emphasis on the word "economic." Certainly, if the prior lawsuit was reason enough for Honeywell to chose to forego a business relationship with TRI, the lawsuit suffices as a motive for an antitrust injury.

III. The Eighth Circuit erred in interpreting *Matsushita Elec. Indus. Co. v. Zenith Radio Corporation* to preclude liability for an antitrust violation motivated by race discrimination and retaliation, based on the absence of a rational economic motive.

It cannot be the law that concerted action in restraint of trade is impermissible when driven by a "rational economic motive," yet justifiable if motivated by discrimination and retaliation based on race. Such a

distinction elevates discrimination to a position of acceptability and allows a discriminatory animus to absolve a defendant from antitrust liability, a result not contemplated nor intended by the *Matsushita* Court. Race discrimination cannot be reduced to rational business decisions. As explained in *Lam v. University of Hawaii*, 40 F.3d 1551, 1563 (9th Cir. 1994):

> Antidiscrimination laws are not predicated upon the existence of economically 'rational' discrimination; the problem that exists and which such laws target is, to a large extent, stubborn but irrational prejudice. Thus, we cannot say that Lam's charges are "implausible" simply because the discriminatory actions might have an adverse economic impact on Professor A. or the University.

Race discrimination has its roots in hate, fear, ignorance, and subconscious attitudes and stereotypes, *see Hamblin v. Alliant Techsystems, Inc.*, 636 N.W.2d 150 (Minn. Ct. App. 2001); *Thomas v. Eastman Kodak*, 183 F.3d 38 (1st Cir. 1999), causing Honeywell, for example, to create and pursue – through a falsified internal affairs investigation, a wrongful discharge, shredded documents, and retaliation for a ten-year-old claim – an "acrimonious history" between itself and Joe Thomas.

Honeywell's acrimonious history caused it to refuse to do business with TRI even though Honeywell had a strong economic reason to purchase TRI products because of TRI's status as a minority-owned company. An Executive Order mandates that companies that do business with the Federal Government must demonstrate goals consistent with the Government's goal of allocating a percentage of its business to minority companies. Honeywell receives "credits" for its minority purchases, and toner cartridges, according to Boise's deposition testimony, are a "big ticket" item, that is, costly in comparison to other office products and, therefore, a means to dramatically increase minority "spend." That Honeywell was

willing to lose the benefit of "credits" for its purchase of toner cartridges, "a big ticket item," from a minority manufacturer that Boise was strongly promoting as a solid company with an excellent product demonstrates that Honeywell, or at least someone in Honeywell, had a motive to hurt TRI that was more important than economics. Souvignier testified that someone "high up" in Honeywell made the phone call. Ruffin testified that Armant had met with "a significantly high senior management individual" in Honeywell. Schneider testified that he went to the legal department with his recommendation. Plantan testified that Schneider "was getting direction" from someone in Honeywell but he did not know from whom. Whether Schneider made one call, two calls, or no calls; whether someone "high up" in Honeywell called Plantan; and whether the legal department, the president, or Schneider was the source of the "decision" and the "direction" that Boise set in motion – are all genuine issues of material fact created by the respondents' own testimony.

Just as Bruce Moss brought the issue of Boise's motive and intent into the forefront and created a genuine issue of fact whether "someone" in Boise acted without corporate approval or knowledge, Souvignier and Plantan and Ruffin created a fact issue whether Honeywell as a corporate entity with a "corporate culture" of race discrimination (*See Hamblin v. Alliant Techsystems, Inc.*) made the decision and gave the direction, or whether "someone" in Honeywell, maybe someone "high up," had a retaliatory racial animus against Joe Thomas strong enough to drive that person to want to hurt TRI. In either case, the racially discriminatory motive had the "effect" of causing a restraint of trade in violation of the antitrust laws. *See GI Corp. v. Hartz Mountain Corp.*, 810 F.2d 795 (8th Cir. 1987) (a "refusal to deal which is anticompetitive in purpose or effect, or both, constitutes an unreasonable restraint of trade in violation of the Sherman Act), c*iting Fount-Wip Inc. v. Reddi-Wip Inc.*, 568 F.2d 1296, 1301 (9th Cir. 1978) ("Pernicious consequences to competition of the claimed conspiracy are

not lessened because the motivation underlying intentionally anticompetitive conduct is personal malice rather than economic self-interest.") In cases in which the plaintiffs were alleged to be destroyed competitors, as well as victims of discrimination, courts have allowed both Sherman Act claims and civil rights claims to go forward. *See Rios v. Marshall*, 530 F. Supp. 351 (S.D.N.Y. 1981) and *Vietnamese Fishermen's Association v. Knights of the Ku Klux Klan*, 518 F. Supp. 993 (S.D. Tex. 1981), both cited in *Rowe v. William Morris Agency*, 1999 U.S. Dist. LEXIS 7786 (S.D.N.Y.), which held:

> The Sherman Act is directed at restraint of trade and its effects; the civil rights statutes are directed at discrimination. But if the reason that two or more persons conspire to restrain trade is racism, there is no logical reason why a plaintiff cannot state an antitrust claim in addition to a civil rights claim so long as the plaintiff has alleged that the racism manifested itself in the form of a boycott which had an anti-competitive impact, affected interstate commerce, and led to plaintiff's suffering an economic injury.[3]

IV. The Eighth Circuit departed from the accepted and usual course of judicial proceedings in granting the respondents' motions for summary judgment on the basis of an affidavit, submitted with Boise's reply brief, of a witness: 1) undisclosed as having the expertise alleged in the affidavit, and 2) providing testimony flatly contradicting the prior deposition testimony of Boise's senior management.

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[3] The court's discussion of rational economic motive in finding no inference of conspiracy is seemingly inconsistent with the above holding. The court, however, based its finding that an inference of conspiracy was "impossible" on the plaintiff's inclusion in only five facts supporting antitrust claim just three out of 11 booking agency defendants and one out of 27 concert promoters defendants.

The Eighth Circuit held that TRI presented "no evidence that Honeywell influenced or attempted to influence Boise's supplier-distributor relationship with TRI in any way other than to advise Boise that Honeywell did not wish to purchase TRI products," with emphasis on the word, "no." The court also held that Boise, "on the other hand," presented evidence in the form of testimony and affidavits giving "independent reasons" justifying the deterioration of its relationship with TRI. In fact, Boise's senior management, as set forth in the testimony quoted above, could not explain the drastic price increases, which, in turn, caused the drastic decline in sales. Moreover, Boise's managers could give no legitimate business reason why TRI's products were made available to customers throughout the country to order, though not purchase. It was only Elizabeth Grady, in her after-the-fact affidavit, who gave "independent reasons" for the Boise-TRI changed relationship. The Court of Appeals devoted just one sentence in response to TRI's claim of error in the district court's reliance on the affidavit, finding TRI's contention "without merit."

The Eighth Circuit erred in accepting the Grady Affidavit as legitimate. Boise submitted the affidavit with its reply brief and relied on it in support of its motion for summary judgment, in violation of Fed. R. Civ. P. 37(c), for Grady was not disclosed to TRI as having the knowledge she purported to have in her affidavit. Boise created the affidavit for the sole purpose of contradicting all of the testimony of Boise's senior management upon which TRI relied in defending against the respondents' motions. At most, the Grady Affidavit raised a question of fact whether Boise's senior management gave false testimony. For the district court and the Court of Appeals to have accepted the affidavit in full, to the exclusion of all of the deposition testimony, violated the summary judgment standard that a case may not be dismissed where there exists a genuine issue of material fact.

In antitrust law, "courts have repeatedly stressed the importance of viewing the evidence as a whole to give the

antitrust plaintiff the full benefit of his proof, rather than tightly compartmentalizing the case and wiping the slate clean after considering each piece of evidence." *H.J. Inc. v. International Telephone & Telegraph*, 867 F.2d 1531 (8th Cir. 1989). The district court made just three findings in support of its holding that the evidence was equally consistent with independent action. Two of those findings come from the Grady affidavit. In its interrogatory responses, Boise had disclosed Elizabeth Grady only as having knowledge of "procurement of product from TRI" and "customer complaints regarding TRI from sales reps." Yet, with its reply brief, Boise submitted the Grady affidavit and represented that Grady was the Boise employee with the knowledge of Boise's sales practices that the top Boise regional and national managers lacked, even though those managers held much higher positions than Grady, and even though those manages were the three persons designated by Boise, in response to 30(b)(6) deposition notices, as the persons with the following knowledge and responsibility:

> 1) Most responsible and knowledgeable concerning the nature and substance of business agreements and contracts between Boise Cascade Office Products, Inc. and its suppliers and its customers.
>
> 2) Most responsible and knowledgeable concerning policies, practices, programs, strategies, standards, and guidelines for marketing and selling the products of minority suppliers to national accounts such as Honeywell, Inc.
>
> 3) Most responsible and knowledgeable concerning the overall management of Boise Cascade Office Products, Inc.'s business relationship with and sales to Honeywell, Inc. as a national account.

In her affidavit, Grady listed her job responsibilities as overseeing the persons responsible for all of the following:

"local purchasing functions, stocking, receiving, order fulfillment, delivery, sales administration, electronic commerce, accounts receivable, human resources and customer service." Not only did Grady profess to have extensive knowledge of Boise's sales practices, when such knowledge attributed to Grady was never disclosed to petitioner, Grady also made numerous assertions that directly conflicted with the testimony of Boise's top managers. In *Corner Pocket, Inc. v. Video Lottery Techs.*, 123 F.3d 1107, 1112-1114 (8th Cir. 1997), the court held that an affidavit of an undisclosed witness proffering evidence contradicting the record evidence is unconscionable and prohibited. *see also, Prosser v. Ross*, 70 F.3d 1005, 1008 (8th Cir. 1995); *Carey v. Shiley, Inc.*, 32 F. Supp. 2d 1093, 1101 (D. Ia. 1998).

Petitioner, at oral argument to the district court, went through almost every one of Grady's assertions and demonstrated how each one contradicted prior testimony. For example, Grady asserted that the TRI price increases were "normal," which directly conflicted with Moss's testimony that he had no idea why someone would drive the prices up like that, and that such increases would drive customers away. Grady asserted, "Contrary to TRI's suggestion, Bruce Moss does not review pricing on every product stocked and shipped," when it was Moss himself who testified that he would be involved in the mark-up of TRI products. Grady asserted that prices "change constantly," although Van Hootegan testified that only two factors come into play in raising or lowering the prices that Boise offers to national accounts – to maintain profitability and to maintain a competitive position in the marketplace. Grady asserted that pricing changes are "everyday occurrences on all vendor products;" yet, the prices that Honeywell's Minnesota division paid for TRI products stayed the same. Grady also asserted, "It is required that Boise sales reps review each customer's contract pricing at least quarterly but additional reviews can be performed at any time," despite the testimony of Van Hootegan, director of national accounts, who explained that contract prices stay in effect for the duration of

the national account, typically three years. Grady also asserted that Boise's pricing procedures "represent an orderly and successful method by which Boise sells and distributes its hundreds of thousands of products to its customers," in the face of Bruce Moss's testimony that Boise's price increases of TRI products would have a "profound" negative effect on the sales of those products and would lead customers to "stop buying the product."

In addition to her blatant contradictions of the record, Grady also used her affidavit to submit documents to the court not disclosed in discovery and to accuse petitioner of not including in its summary judgment exhibits a document that Boise had not disclosed to petitioner.

Grady devoted exactly *ten* paragraphs in her affidavit – "6" through "15" – trying to refute the significance that TRI attached to the invoices showing the SKU's for TRI products in out-of-state locations.[4] Grady alleged that the invoices reflect "Boise's set procedures for entering SKU's into its central database," and that TRI's allegations reflect TRI's "lack of knowledge of BCOP's established procedures and methods." However, Grady's representation of Boise's "established procedures and methods" directly contradicted the deposition testimony of top Boise management. If TRI has a lack of knowledge of Boise's procedures, then apparently so does Boise's top management, who were unable, in their depositions, to explain why TRI SKU's would have been entered into the local databases of various Boise warehouses throughout the country, making TRI available to customers nationwide for *ordering* though not for purchasing.

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[4] TRI relied on the testimony of Boise's managers to explain that the Boise invoices showing unfilled orders for TRI products from customers outside Minnesota, with SKU numbers for TRI products in Boise distribution centers in other states: 1) confirm the Honeywell-Boise-TRI deal for Boise to distribute TRI nationally to Honeywell; and 2) evidence Boise's intent to hurt TRI competitively by leaving the SKU numbers in the out-of-state distribution centers in place, prompting orders from customers interested in TRI, and then failing to fill those orders, generating negative impressions of TRI.

Grady asserted that customers have access to Boise's central database:

> A BCOP customer, unfamiliar with TRI, could access a TRI product on the Internet by typing generic queries to search for toner cartridges. A listing of all toner cartridges sold by BCOP will appear and the customer may order any item. However, when a customer orders a product from the BCOP database, the customer does not know where that product is warehoused.

According to Van Hootegan, however, Boise customers do not have access to the Boise database and could not have ordered TRI on the Internet. The database and the Internet web page, explained Van Hootegan, are different. Goudge likewise explained, "database and ordering process are two different things." Only Boise sales representatives have access to the Boise database. Van Hootegan explained that if a customer wanted to order a product from the general database, the customer could not do so through the Internet. The customer "could call up to [Boise's] customer service department and [Boise's] customer service people have a view of all products at all distribution centers." The only products that customers can access on the Internet are the "items that are in the written catalogue," or, in the case of the national accounts, the products on the Boise Internet ordering website that are "proprietary to that contract." If Grady were correct that customers could access Boise's central database, which has "several hundred thousand" SKU's compared to the catalogue which has about 11 or 12 thousand, then the advantage for Boise suppliers of being in the catalogue would all but disappear, contradicting everything Frank Virella, Director of Merchandising and Vendor Management, explained about the significance of a product being in the catalogue. Suppliers not only have to qualify to be in the catalogue; they have to pay to be in the catalogue. Moreover, from Boise's perspective, once a product makes it into the

catalogue, for example, a printing cartridge, the message to Boise's sales people is clear – "sell that cartridge."

In addition to the notion that customers could have accessed the Boise central database via the Internet and thereby ordered TRI, the district court also accepted Grady's justification for Boise failing to fill TRI's orders, that is, that they were unavailable anywhere but Minnesota. In her affidavit, Grady set forth the following sequence of events that she claimed occurs when a customer orders a product from a location that does not stock it:

> If a customer orders a product from a BCOP location that does not stock the product, a BCOP customer service or purchasing representative makes a sourcing decision (from where to obtain the product). The person sourcing the product looks for local alternatives to the customer's request and/or for shipping from another location. A customer may receive an initial response to their order that states: "not stocked, select alternate" or "Backordered, Item temporarily out."

Almost all of the Boise invoices showing unfilled orders for TRI products informed the customer that the product was "Backordered, Item temporarily out."

Not only do Grady's assertions contradict the assertions made in sworn, prior deposition testimony; Grady's assertions do not comport with common business practices or even common sense. Grady's story has customers sifting through hundreds of thousands of products, spending time to make their selections, unable to know which products are available to them and which are not. Her story has customers all over the country able to access TRI in Boise's central database and able to order it, but only local customers able to actually receive it. That no company would set up its ordering procedures as a guessing game – wasting its own employees' time on "sourcing decisions" and alternative product searching, wasting its customers' time selecting and ordering unavailable products, and *lying to the customer* that

products are "backordered" and "temporarily out" when they are, in fact, not even carried by that location – is obvious. That Boise did not set up its ordering procedures as alleged by Grady is proven by the deposition testimony, as are all of Grady's other allegations, and the district court and court of appeals should not have accepted the unsupported assertions of an after-the-fact affiant, unidentified to petitioner as having the knowledge purported in the affidavit, over the testimonies of Moss, Van Hootegan, Goudge, and Virella, about Boise's internal practices.

In *Poller v. Columbus Broadcasting Sys.*, 368 U.S. 464, 471 (1962), regarding the granting of summary judgment in antitrust cases, this Court held:

> We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is not a substitute for trial by jury which so long has been the hallmark of even handed justice.

Concerted action in restraint of trade may be deduced from the conduct of the parties and the attending circumstances. Evidence of an unexplained changed relationship between an antitrust plaintiff and defendant supports an inference of antitrust conspiracy. Evidence of pretext, of motive, and action against self-interest supports a finding of concerted action. And evidence that the defendants have acted in a way that cannot be explained by legitimate business reasons leads to a finding of the defendants' joint action. The evidence in TRI's case, viewed in its entirety and uncompartmentalized, is not equally consistent with respondents' independent action. The evidence shows: 1) an excellent prior relationship between TRI and Boise, with TRI situated as Boise's

"minority supplier toner offering in the Twin Cities," and Boise "excited about TRI as a supplier" and "trying to open doors" for TRI, marketing and promoting TRI locally and nationally; 2) a "history" between Honeywell and TRI officer Joe Thomas that Honeywell describes as "acrimonious," which caused Honeywell to refuse to do business with TRI; 3) a phone call from a Honeywell official to a Boise official giving a "direction" to Boise that it was to go a different "route," and "as a provider of [Honeywell's] supplies and a significant customer that they were, [Boise] did what they said;" 4) proof that respondents' proffered reason for the phone call – that Boise not deliver TRI "within" Honeywell – was pretextual; and 5) following the phone call, a drastic change in the relationship between TRI and Boise and a sharp decline in sales of TRI products to Boise's major TRI purchasers and to Boise, accompanied by dramatic price increases in TRI products that Boise senior management could not explain or justify, which were admittedly contrary to sound business practice, against Boise's self-interest, and bound to have a "profound," negative effect on sales and ultimately cause customers to stop buying TRI products.

Rather than looking to all of the evidence in the record proving respondents did not have legitimate reasons for their conduct, the district court looked to an isolated, minute fact in a chart and to an affidavit submitted improperly with a reply brief and lacking any semblance of credibility because of all its contradictions with record evidence. Compartmentalizing the case and the chart as well, and reducing a voluminous record to a prohibited affidavit and a chart, the district court erred in granting summary judgment to the respondents, and the court of appeals erroneously affirmed.

V. The Eighth Circuit departed from the accepted and usual course of judicial proceedings in granting respondents' motions for summary judgment where the respondents and their attorneys engaged in a course of conduct obstructing the petitioner's discovery of relevant evidence, including an instruction to a key witness to

destroy documents subsequent to the initiation of the lawsuit and subsequent to respondent Honeywell's identification of the witness as "likely to have discoverable information."

The law forbids the discovery conduct in which respondents engaged, recognizing the impact of that conduct upon the opposing party's ability to prove its case. In *Chyrsler v. Carey*, 186 F.3d 1016 (8th Cir. 1999), the court found that the defendants' efforts to deny and conceal evidence and to provide false and misleading testimony was "a direct affront to the court," "denied [the plaintiff] the ability to conduct effective discovery," "seriously threatened the integrity of the judicial process in general," and forced the plaintiff to go to trial "lacking evidence it would have had but for the deceit of the defendants." The court upheld the district's court's default judgment against the defendants.

The Eighth Circuit held that the petitioner's objections to the respondents' discovery conduct were not preserved for appeal because "there is no indication that TRI brought these discovery complaints to the attention of the district court." TRI did, in fact, direct the district court's attention to the conduct of the respondents, both in its summary judgment brief and its oral argument. The oral argument was devoted almost entirely to the improper submission of the Grady Affidavit, with TRI demonstrating, point by point, how Grady's assertions contradicted the deposition testimony of Boise's top officers. The summary judgment brief brought to the court's attention the testimony of a crucial Honeywell witness that she had been instructed to destroy documents. The brief also brought to the attention of the district court this same witness's testimony that she had not learned of the lawsuit until several months after Honeywell had filed its answer, filled with assertions about this particular witness's knowledge of the facts relevant to the petitioner's claims. Except for TRI's objections to Honeywell's coaching of its witnesses, discovery motions would not have cured the litigation conduct of the respondents, which included the

following, all of which TRI brought to the attention of the district court:

Honeywell's untruthful Answer.

Honeywell's attorney signed Honeywell's Answer on June 21, 2000, "deny[ing] that Helen Kimbrough ever communicated to anyone that Honeywell had refused a decision to purchase petitioner's products;" yet, Kimbrough testified she did not learn of the lawsuit until 2001. Honeywell asserted in its Answer that it lacked sufficient knowledge to admit or deny paragraphs in the Complaint; yet, Honeywell wrote its Answer without talking to Kimbrough about her knowledge of the assertions in the Complaint, many of which involved Kimbrough.

Honeywell's untruthful Rule 26 Disclosures.

Petitioner's Complaint made several factual assertions pertaining to Helen Kimbrough. Kimbrough's name is stated in the Complaint ten times. Honeywell's attorney signed Honeywell's Rule 26 disclosures on August 21, 2000, representing that Helen Kimbrough may have knowledge of facts relevant to the complaint, including "the lack of any wrongdoing on the part of Honeywell towards TRI," without conferring with Kimbrough, who testified that she did not learn of the lawsuit until 2001. Kimbrough also testified that at no point in time did she ever search her files or her records to see whether she had any relevant documents.

Honeywell's untruthful Interrogatory Answers and untruthful responses to TRI's requests for admissions.

Before Schneider's deposition, Honeywell's attorney submitted answers to interrogatories stating that Schneider made the phone call "on or about October 20, 1998." Schneider testified that he was "positive" he had made the call after November 5, 1998. Following Schneider's deposition, Honeywell responded to petitioner's requests for admissions stating that Schneider made the call in October of 1998, referencing, and contradicting, Schneider's deposition.

Honeywell's instruction to Kimbrough to destroy documents after Kimbrough was identified to TRI as a person with knowledge of TRI's claims.

Kimbrough testified that she was instructed by management to destroy documents, after the TRI's lawsuit was filed and after she was identified in the Rule 26 Disclosures as "an individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings."

Contradictions between Boise's interrogatories and testimony.

Boise offered sworn answers that it never took any steps to promote or distribute TRI, and yet Souvignier testified to all of Boise's efforts to promote TRI, and the Bancorp proposal definitively proves that Boise promoted TRI.

Ruffin affidavit.

Boise submitted the affidavit of Ruffin, who testified that he did not remember writing the affidavit or having had a draft prepared for him that he signed. Ruffin also testified, in contradiction to the assertion in the affidavit that he "knew nothing of TRI's quality," that he had personally toured the TRI facility and witnessed firsthand enough of TRI's quality tests to allow him to conclude that TRI truly went above and beyond the call of duty in testing the quality of their products.

Souvignier affidavit contradicting Souvignier's deposition testimony.

Souvignier asserted in his affidavit, submitted with Boise's reply brief, that there was nothing unique about TRI, when Souvignier had testified about Boise's positive experience with TRI, as compared to its negative experience with the recycled printing cartridge companies that Boise had dealt with prior to its relationship with TRI. Souvignier had

also testified that TRI's officers, as engineers, had the background to put together a good cartridge, and that he was excited about TRI as a company, as was Bruce Moss.

This Court held in *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806 (1999):

> The lower courts. . . have held with virtual unanimity that a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement (by, say, filing a later affidavit that flatly contradicts that party's earlier sworn deposition) without explaining the contradiction or attempting to resolve the disparity.

CONCLUSION

For all the reasons set forth above, petitioner respectfully requests the Court to grant its petition for a writ of certiorari.

Dated: May 14, 2003

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-3919

TRI, Inc.,	*
Appellant,	*Order Denying Petition for
vs.	*Rehearing and for Rehearing
	*En Banc
Boise Cascade Office Products,	*
Inc., et al.,	*
Appellees.	*

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)
February 13, 2003

Order Entered at the Direction of the Court:
s/
Clerk U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-3919	*
	*
TRI , Inc.,	*
Appellant,	*
	*Appeal from
	*the United States
v .	*District Court for the
	*District of Minnesota.
Boise Cascade office Products,	*
Inc.; Honeywell, Inc.,	*
Appellees.	*

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

(5172-010199)

January 8, 2003

Order Entered in Accordance with Opinion:
s/
Clerk, U.S. Court of Appeals, Eighth Circuit.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 01-3919

TRI, Inc.,	*
Plaintiff - Appellant,	*
	*Appeal from
	*the United States
v.	*District Court for
	*the District of
	*Minnesota.
Boise Cascade Office Products, Inc.;	*
Honeywell, Inc.,	
Defendants - Appellees.	

Submitted: October 7, 2002
Filed: January S, 2003

Before BOWMAN, RICHARD S. ARNOLD, and LOKEN, Circuit Judges.

LOKEN, Circuit Judge.

Boise Cascade Office Products, Inc. ("'Boise") is a nationwide distributor of thousands of office products manufactured by hundreds of vendors. In February 1998, Boise and Honeywell, Inc. entered into a Master Agreement

establishing terms and procedures whereby Honeywell offices located throughout the United States and Canada could purchase office products from Boise. The terms of the Agreement included a commitment by Boise "to make a best faith effort to direct a reasonable percentage of business to minority/woman owned businesses."

TRI, Inc., a minority-owned manufacturer of recycled printer toner cartridges, is located in Minneapolis. When Boise entered into the Master Agreement with Honeywell, TRI was supplying recycled toner cartridges to Boise customers in the Twin Cities area and hoped to become one of Boise's national suppliers. In the fall of 1998, Boise's national Minority Business Development Manager introduced TRI to his counterparts at Honeywell as a prospective minority-owned supplier under the Master Agreement. Shortly thereafter, Honeywell advised Boise that Honeywell would not purchase recycled toner cartridges produced by TRI. TRI's sales to other Boise customers declined in the following months.

TRI commenced this action against Honeywell and Boise, alleging a conspiracy to harm TRI and asserting antitrust claims under section l. of the Sherman Act, 15 U.S.C. § l, and the Minnesota antitrust statute, Minn. Scat. § 325D.51; claims of race discrimination under 42 U.S.C. § 1981 and the Minnesota Human Rights Act, Mien. Stat. § 363.03; and tort claims for intentional interference with contractual relations and prospective business advantage. TRI now appeals the district court's[1] grant of summary judgment dismissing all claims. Reviewing the grant of summary judgment de novo, we affirm. See Brookins v. Int'l Motor

[1] The HONORABLE RICHARD H. KYLE, United States District Judge for the District of Minnesota.

Contest Ass'n, 219 F.3d 849, 852 (8th Cir. 2000) (standard of review).

I. Background.

Joseph Thomas is an owner and officer of TRI. Thomas was fired by Honeywell in 1990 for sexually harassing a co-worker. He sued Honeywell, alleging race discrimination and defamation. The race discrimination claim was dismissed for lack of proof, and the defamation claim was defeated by Honeywell's defense of qualified privilege. See Thomas v. Honeywell, Inc.. No. C8-94-29,1994 WL 495087 (Minn. App. Sept. 13, 1994). In 199 , Thomas and his partners formed TRI with a plan to hire disadvantaged workers to produce high quality recycled toner cartridges. M's annual sales grew to $3.14 million in 1997 but declined to $1.3 million in 2001.

It is undisputed that, shortly after Boise introduced TRI to Honeywell as a potential minority-owned supplier, Michael Schneider of Honeywell called David Plantan of Boise to advise that Honeywell would not purchase TRI's recycled toner cartridges from Boise. Honeywell's decision was based upon Thomas" s prior lawsuit against Honeywell. After Schneider's phone call in late October or early November 1998, a few Honeywell offices in Minneapolis purchased TRI products, but only in small quantities. Boise continued to use TRI as a supplier of recycled toner cartridges in the Twin Cities area, but TRI's sales to Boise (and to other large TRI customers) declined an 1999 and 2000.

In response to defendants' motions for summary judgment, TRI submitted evidence that, after Schneider's phone call, Boise sales representatives stopped aggressively promoting TRI products to other customers, selectively

increased Boise's prices on TRI products sold to other customers, and did not fill orders for TRI products from customers outside the Twin Cities area, These actions resulted in a substantial decline in TRI's sales to Boise and its customers. There was no written contract between TRI and Boise, only a series of purchases and resale's by Boise.

The district court dismissed TRI's antitrust claims on the ground that TRI failed to prove an agreement in restraint of trade between Boise and Honeywell to injure TRI. The court dismissed the § 1981 claims because TRI failed to prove that Honeywell's reason for refusing to do business with TRI was a pretext for intentional race discrimination, and because TRI's retaliation claim was not properly pleaded. The court dismissed TRI's state lave discrimination claim as time-barred, and its tortuous interference claims for lack of proof. TRI failed to brief the tortuous interference claims on appeal, and we therefore decline to consider them.

II. The Antitrust Claims.

TRI argues that Boise and Honeywell violated Section I of the Sherman Act, which declares unlawful "[e]very contract, combination... or conspiracy, in restraint of trade or commerce among the several States." IS U.S.C. § 1. Section I focuses exclusively on concerted action. Thus, Honeywell's unilateral refusal to purchase TRI's products, either from Boise or directly from TRI, cannot violate § 1. See, e.g., Monsant Co v Spray-Ri Serv Corp , 465 U.S. 752, 761 (1984). However, if Honeywell and Boise agreed that Boise would not sell TRI products to any customer, that agreement could fall within § 2's prohibition, assuming TRI could produce adequate proof that the agreement was "in restraint of trade." TRI argues that such an agreement may be inferred from the actions Boise took after the phone call from

Honeywell that hurt Boise's sales of TRI products to other Boise customers.

To survive a motion for summary judgment, a § 1 plaintiff must present evidence of an agreement or conspiracy "that tends to exclude the possibility that [the defendants] were acting independently." Monsanto, 465 U.S. at 764. "[I]f [the defendants] had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy," and summary judgment is appropriate. Matsushita Elec. Indus. Ca. y Zenith Radio Corp., 475 U.S. 574, 596-97 (1986); see Blomkest Fertilizer, Inc. v, Potash . of S ask.. 203 F.3d 1028, 1032 (8th Cir.) (en banc), cert. denied. 531 U.S. 815 (2000).

In this case, we agree with the district court that TRI presented insufficient evidence of an agreement or conspiracy between Honeywell and Boise to restrict Boise's sale of TRI products to other Boise customers. TRI, Boise, and Honeywell do not compete with each other in any segment of the office products market In traditional antitrust terms, TRI is a manufacturer or supplier, Boise is an independent distributor, and Honeywell is an end user of one type of office product. Thus, Honeywell bad no rational economic motive to coerce Boise into not selling TRI products to Boise's otter customers. Nor was it in Boise's economic interest to allow Honeywell to restrict Boise's sales to other end users. Rather, to the extent TRI manufactured products desired by Boise's customers (other than Honeywell), "it is much more plausible to believe that [Boise's] interests coincided, rather than conflicted, with those of [TRI]." First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 285(1968).

TRI presented no evidence that Honeywell influenced or attempted to influence Boise's supplier-distributor relationship with TRI in any way other than to advise Boise that Honeywell did not wish to purchase TRI products. On the other hand, Boise presented deposition testimony and affidavits from its national and Twin Cities sales personnel giving independent reasons for the decline in Boise's sales of TRI products after October 1998, for declining to fill orders for 1'RI products from customers who could not be served by Boise's Twin Cities distribution center, and for the few price fluctuations that TRI found through discovery of Boise's sales records. On this record, the district court properly granted summary judgment dismissing TRI's antitrust claims.[2]

III. The § 1981 Claims.

TRI's complaint alleged that Honeywell violated 42 U.S.C. § 1981(a) "by engaging in purposeful racial discrimination against TRI, through interference with TRI's contractual relationship with Boise," Like the district court, we assume without deciding that § 1981's protections extend to minority-owned corporations such as TRI. See Webster v. Fulton County, 283 F.3d 1254, 1256 n.3 (11th Cir.), cert. denied, 532 U.S. 942 (2002). We also assume that TRI presented sufficient evidence to establish a prima facie case

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[2] Like § 1, the Minnesota statute declares: "A contract, combination or conspiracy between two or more persons in unreasonable restraint of trade or commerce is unlawful." Minn. Stat. § 325D.51. TRI's claim under this statute was properly dismissed because the Minnesota antitrust laws are interpreted consistently with the federal antitrust laws. S Minn Twins ship v. State. 592 N.W.2d 847, 856 (Mien.) (adopting the federal antitrust exemption for professional baseball), cert. denied, 528 U.S. 1013 (1999).

of racial discrimination against the company. See Williams v. Lindenwood Univ., 288 F.3d 349,355 (8th Cu. 2002).

However, we agree with the district court that Honeywell offered a legitimate, nondiscriminatory reason for refusing to deal with TRI -- the prior lawsuit Joseph Thomas filed against Honeywell -- and that TRI failed to present sufficient evidence that this stated reason was a pretext for intentional race discrimination. There is undisputed evidence, including Honeywell's Master Agreement with Boise, that Honeywell actively sought to do business with minority-owned office products suppliers. There Xs also undisputed evidence that the Honeywell decision-makers who refused to deal with TRI in 1998 knew that Thomas had sued Honeywell but did not know that he had alleged race discrimination by Honeywell in that lawsuit, In these circumstances, summary judgment on the section 1981 claim is proper. Although TRI argues that Honeywell acted from "a discriminatory animus toward Thomas," it offered insufficient proof that the animus was based upon race.

TRI also appeals the district court's ruling that it failed to plead a § 1981 retaliation claim, arguing that the retaliation claim was "inquired into during discovery and was "inextricably intertwined' with the [race] discrimination claim" The district court declined to consider the retaliation claim, noting that TRI's complaint did not assert a retaliation claim, and that "claims of race discrimination are separate and distinct from. . . claims of retaliation." Williams v. Little Rock Mun. Water Works, 21 F.3d 218, 223 (8th Cir. 1994). This ruling was not an abuse of the court's substantial discretion. In addition, the district court concluded that the retaliation claim "lacks an adequate basis in the law." We agree. Because the Honeywell decision-makers who refused to deal with TRI were not aware of the alleged protected

activity -- Thomas's assertion of a race discrimination claim in his prior lawsuit against Honeywell -- TRI's purported retaliation claim fails for lack of a causal connection between the protected activity and the adverse action against TRI many years later. ee Smith v. Riceland Foods, Inc.. 151 F.3d S 13, 818-19 (8th Cir. 1998).

IV. The Minnesota Human Rights Act Claims.

TRI's complaint alleged that Honeywell violated Mina. Stat. § 363.03, subd. 8a(c), a provision of the Minnesota Human Rights Act, "by intentionally refusing to do business with TRI because of TRI's status as a minority owned corporation." Claims under this statute must be filed "within one year after the occurrence of the [unfair discriminatory] practice." Minn. Stet § 363.06, subd 3 Honeywell refused to buy TRI products from Boise in October 1998, and TRI learned of the refusal shortly thereafter. TRI filed this lawsuit in June 2000. Accordingly, the district court concluded that "TRI brought its claim about five months too late."

TRI argues that this claim is not time-barred because Honeywell's October 1998 phone call to Boise "created the beginning of an agreement between Honeywell and Boise, initiated by Honeywell, to harm TRI." But the claim as pleaded was a simple refusal to deal, which is a discrete, adverse discriminatory act. When applying the term "occurrence of the practice" in § 363.06, subd. 3, to this type of claim, the statute of limitations begins to run when "the discriminatory act [occurred] rather than when the consequences of that act become most painful." Turner v. IDS Fin. Servs., Inc., 471 N.W.2d 105, 108 (M1991) (citation omitted). Moreover, as our discussion of TRI's antitrust claims makes clear, TRI presented insufficient evidence of

"an agreement between Honeywell and Boise . . . to harm TRI," so its belated attempt to avoid the statute of limitations by restating its refusal-to-deal clean as some sort of continuing violation claim cannot succeed. The district court properly dismissed this claim as time-barred.

Finally, TRI urges us to reverse the district court's grant of summary judgment because counsel for Honeywell and Boise engaged in "obfuscatory" discovery conduct, such as coaching deposition witnesses and filing contradictory and untruthful affidavits and disclosures. However, there is no indication that TRI brought these discovery complaints to the attention of the district court, as the objecting party did, for example, in Chrysler Corp. v Carey, 186 F.3d 1016, 1019 (8th Cir. 1999) Thus, these discovery issues were not preserved for appeal. TRI further argues that the district court erred in considering an affidavit first submitted by Boise with its summary judgment reply memorandum. After careful review of the record, we conclude this contention is without merit.

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

2001 U.S. Dist. LEXIS 17800, *;
2001-2 Trade Cas. (CCH) p73,508

TRI, Inc.,
Plaintiff,

v.

Boise Cascade Office Products, Inc., and Honeywell, Inc.,
Defendants.

Civil No. 00-1464 (RHK/AJB)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

2001 U.S. Dist. LEXIS 17800; 2001-2 Trade Cas. (CCH)
P73,508 October 15, 2001, Decided

DISPOSITION: [*1] Defendant's motion for summary judgment was granted. Defendant's motion to dismiss was granted. Plaintiff's complaint was dismissed with prejudice in its entirety.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff, a corporation that manufactured and sold recycled toner cartridges for laser printers and facsimile machines, alleged that defendant, manufacturer and seller a variety of residential and commercial building control devices, violated 42 U.S.C.S. § 1981. The corporation also claimed that defendants violated § 1 of the Sherman Act. Defendant manufacturer moved for summary judgment. Defendant retailer moved to dismiss the complaint.

OVERVIEW: The corporation alleged that the manufacturer violated 42 U.S.C.S. § 1981 by (1) engaging in purposeful racial discrimination against the corporation, (2) interfering with the corporation's contractual relationship with defendant retailer and (3) interfering with the corporation's enjoyment of the benefits, terms and conditions of its contract with the retailer. The court found that the employee of corporation not come forward with sufficient evidence from which a jury could determine that the manufacturer's stated reason for not wanting to do business with the corporation, its prior experience with the employee, was a pretext for racial discrimination against the corporation as a minority owned business. The corporation also alleged that defendants violated § 1 of the Sherman Act. The court concluded that the corporation had failed to establish a central element of its 15 U.S.C.S. § 1 claim, an agreement to act in restraint of trade. Moreover, the court reasoned the corporation had failed to articulate a rational economic motive for the defendants to injure the corporation's sales.

OUTCOME: The motions of the defendants were granted and the complaint was dismissed.

CORE TERMS: summary judgment, racial discrimination, telephone call, cartridges, customer, retaliation, conspiracy, minority-owned, former employer, Sherman Act, prima facie case, former employee, toner, Minnesota Human Rights Act, contractual relationship, direct evidence, antitrust, tortious interference, intentionally, nationally, lawsuit, restraint of trade, independent action, proffered reason, nonmoving party, burden-shifting, articulate, confirmed, volume, motive

COUNSEL: William J. Mavity and Pamela M. Miller, Mavity & Associates, Minneapolis, Minnesota, for Plaintiff.

John Harper and III, Terrance J. Wagener, Krass Monroe P.A., Bloomington, Minnesota, for Boise Cascade Office Products, Inc., Defendant.

Robert R. Reinhart and Michael Iwan, Dorsey & Whitney L.L.P., Minneapolis, Minnesota, for Honeywell, Inc., Defendant.

JUDGES: RICHARD H. KYLE, United States District Judge.

OPINIONBY: RICHARD H. KYLE

OPINION: MEMORANDUM OPINION AND ORDER

Introduction

Before the Court is Defendant **Honeywell**, Inc.'s ("**Honeywell**") Motion for Summary Judgment and Defendant **Boise** Cascade Office Products, Inc. 's ("**Boise**") Motion to Dismiss Plaintiff **TRI**, Inc.'s ("**TRI**") Complaint or, in the Alternative, for Summary Judgment. Boise removed this action from Hennepin County District Court on the basis of federal question jurisdiction and supplemental jurisdiction.

TRI asserts two federal statutory [*2] claims against Honeywell and Boise.[1] First, **TRI** alleges that **Honeywell**

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[1] At the hearing on the defendants' motions, counsel for TRI indicated that it was voluntarily dismissing its racial discrimination claims against Boise - - namely, the claims under 42 U.S.C. §§ 1981 and 1985 and the claims under the Minnesota Human Rights Act ("MHRA"). Furthermore, counsel for TRI confirmed that TRI is no longer pursuing a 42 U.S.C. § 1985(3) conspiracy claim against Honeywell.

violated 42 U.S.C. § 1981 by (1) engaging in purposeful racial discrimination against **TRI**, (2) interfering with **TRI's** contractual relationship with **Boise** and (3) interfering with **TRI's** enjoyment of the benefits, terms and conditions of its contract with **Boise**. Second, **TRI** claims that **Honeywell** and Boise violated § 1 of the Sherman Act by entering into an agreement by which Boise would significantly cut its volume of business with TRI and terminate plans to enter into a national contract with it.

In addition to the federal claims, TRI asserts several state statutory and common law claims against the defendants. TRI alleges that Honeywell violated § 363.03, subd. 8a(c) of the Minnesota Human Rights Act ("MHRA") by intentionally refusing to do business with TRI because of its status as a minority-owned business.[2] TRI also asserts common law claims of tortious interference with contract and prospective business relations against Honeywell. For the reasons set forth below, the Court will grant the defendants' motions.

Background

I. The Parties

TRI is a privately held Minnesota corporation that manufactures and sells recycled toner cartridges for [*4] laser printers and facsimile machines. (See Compl. P 3, Boise Amended Answer P 4; Thomas Dep. at 22.) Joseph Thomas, a

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[2] Counsel for TRI also confirmed at the hearing that it was voluntarily dismissing its claims under the Minnesota Human Rights Act against Boise. Furthermore, because the racial discrimination claims against Boise were no longer in the case, TRI was also voluntarily dismissing its "aiding and abetting" claim against Honeywell under the MHRA.

former Honeywell employee,[3] founded TRI in 1991 together with five other individuals. (See Thomas Dep. at 7, 12-13.) From 1991 until July 1998, Thomas worked at TRI and was its co-president, with Ron Armant, from time to time. (Aff. of Joseph Thomas P 1; Aff. of Ron Armant P 1.) At the height of its operations, in 1998, TRI employed fifty-four people; it currently employs seventeen individuals, including Thomas. (Thomas Dep. at 23-24.) Thomas is African-American, and TRI is deemed a "minority-owned corporation."

Defendant Boise is a national retailer of office products. Boise presently sells various brands of office products through a network of forty-five distribution centers located in metropolitan areas throughout the United States, including one in the Twin Cities. (See Moss Dep. at 7.) Boise also maintains [*5] a catalogue of products that are distributed on a national basis. Boise sells office products in Minnesota. Boise represents that it is a leader in the resale of office products that are manufactured by minority- and women-owned enterprises. (Compl. P 4; Boise Amended Answer P 5.) Beginning in 1995, Boise began carrying TRI's recycled toner cartridges in the Twin Cities market in Minnesota. (Compl. P 6; Boise Amended Answer P 7.)

Defendant Honeywell manufactures and sells a variety of residential and commercial building control devices such as heating, cooling, and security control equipment, as well aircraft component parts. (Honeywell 2000 Product Segment Reports (Iwan Aff. Ex. B); Honeywell 1999 Annual Report (Id. Ex. C).) In late 1999, Allied Signal, Inc. ("Allied") purchased Honeywell and merged Honeywell into Allied.

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[3] Thomas worked at Honeywell from 1974 until 1990. (Thomas Dep. at 7.)

Shortly after this merger, Boise lost the Honeywell account and never regained it. (Ruffin Dep. at 103.)

II. TRI's Relationship with Boise and Honeywell in 1998

The events that underlie the parties' dispute occurred in 1998. In early 1998, Boise and Honeywell entered into a "Proprietary Master Agreement Purchase of Office Products." (Iwan Aff. Ex. [*6] D.) Pursuant to this agreement, Boise obtained a position as a preferred source of office products and supplies to Honeywell. Boise agreed that Honeywell divisions could purchase products directly from Boise at specified prices. (See Plantan Dep. at 72.) For its part, Honeywell made no commitment to purchase any specific products or any set volume.

TRI asserts that, in the spring of 1998, its representatives began talking to Boise about selling its toner cartridges nationally through Boise.[4] (Thomas Dep. at 55.) Those discussions culminated in a June meeting attended by Bruce Moss, general manager of Boise; Bill Souvignier, regional sales manager for Boise; David Plantan, national sales manager for Boise; Ron Armant, TRI's president for sales and administration; and Joseph Thomas, TRI's president of operations. (Id.) There was no written agreement between Boise and TRI requiring Boise to purchase TRI cartridges, nor was there a written agreement obligating Boise to distribute TRI products either nationally or locally. (See Mott

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[4] Sharon Grass, a sales representative for TRI, spent approximately half of her time working closely with Boise. (Mott Dep. at 27.) In the spring of 1998, Grass left TRI and no one was hired to replace her. The persons who took over as TRI's primary sales contact with Boise were Mike Waulk and Ron Armant. (Armant Dep. at 105.)

Dep. at 32-33; Thomas Dep. at 53-54; Waulk Dep. at 22-24.) There also was no written contract between either Honeywell and TRI or Boise and TRI requiring [*7] the purchase of TRI products by Honeywell. (Answers to Requests for Admissions Nos. 1-2 (Iwan Aff. Ex. A).)

In July 1998, Paul Ruffin assumed the role of Boise's corporate manager of minority business supplier development and diversity., (Ruffin Dep. at 26-27.) Ruffin corresponded with Armant in September 1998 about placing TRI's product in the national Boise catalog -- it was too late, however, to consider TRI for inclusion in the 1999 catalog. (Id. at 63-64.) In the fall of 1998, Boise coordinated a meeting in Minneapolis for Honeywell and other businesses for the purpose of introducing those businesses to local minority-owned businesses in and around Minneapolis. At this meeting, [*8] Armant met Helen Kimbrough, a minority supplier liason from Honeywell.[5] Armant gave a presentation about TRI's products. (See Kimbrough Dep. at 27-28.) Also representing Honeywell at the meeting was Michael Schneider. (Id. at 28.) Armant was the only individual on behalf of TRI who ever met with a Honeywell representative regarding TRI's product lines. (Thomas Dep. at 153.)

On October 15, 1998, Boise and Honeywell held their annual business meeting in Phoenix, Arizona. (See Compl. P 9; Boise Amended Answer P 10; Honeywell Answer P 10.) At that meeting, Plantan met Michael Schneider, a Honeywell buyer who was Plantan's new contact at Honeywell

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[5] While Armant was with TRI, he did not observe any significant change in the level of business TRI was doing with Boise. (Armant Dep. at 52 (part of Ex. B to the Harper Aff.).) Armant left as president of TRI in November of 1998. (Id. at 114.)

headquarters. (Plantan Dep. at 31.) Plantan identified TRI to Honeywell as a minority manufacturer that could help [*9] Honeywell increase the dollars spent on products purchased from minority-owned businesses. (See Plantan Dep. at 42, 62-63.)

Between October 17 and 20, during a meeting of the National Minority Supplier Development Council ("NMSDC") in Florida, Armant and Kimbrough again met. (See Compl. P 11; Honeywell Answer P 12; Kimbrough Dep. at 38.) Armant spoke to Kimbrough and Ruffin about Honeywell's purchase of TRI toner cartridges nationally through Boise. (Armant Dep. at 77.) TRI asserts that Armant was told that "everything was a go, basically the deal was done," such that Armant assumed that Honeywell and Boise were going to go forward with a national contract. (Id.)

Shortly after these meetings, on October 20, Schneider called Plantan to inform Boise that Honeywell was not interested in buying TRI products and that Boise should stop promoting TRI's products to Honeywell. (Plantan Dep. at 31, 39; Schneider Dep. at 15-16.) Schneider told Plantan the reason for Honeywell's position was because one of the principals of TRI had previously sued Honeywell.[6] (Schneider Dep. at 16.) Although Plantan tried to probe deeper into the reason for Honeywell's decision, Schneider was "reluctant

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[6] Schneider consulted with his superiors and with Honeywell's Law Department and recommended that Honeywell not do business with TRI on the grounds that it would be imprudent for Honeywell to have further dealings with a business in which a former employee who had sued Honeywell was involved. (Schneider Dep. at 20-22.)

[*10] to give him any additional information."[7] (Id.)

Plantan reported his conversation with Schneider to Moss, his direct supervisor. (Plantan Dep. at 42.) Plantan also called Souvignier and relayed Schneider's comments to him. (Id.) Souvignier in turn called Joseph Thomas as TRI. (Souvignier Dep. at 102; Thomas Dep. at 54.) Thomas reports that Souvignier told him that Honeywell did not want to do buy TRI products "because of him." (See Thomas Dep. at 83.) Thomas told Souvignier that he thought Honeywell's decision might have to do with a lawsuit he had brought [*11] against Honeywell several years earlier. (Souvignier Dep. at 103.)

Nevertheless, between September 1998 and November 1999, local divisions of Honeywell placed at least twelve orders with Boise for TRI cartridges (totaling approximately eighteen cartridges). (Kimbrough Dep. at 64-71; Honeywell Invoices (Ex. C. to Harper Aff.).) Boise filled those orders. Honeywell's corporate headquarters do not control the purchasing decisions of local divisions; the divisions can choose to purchase office supplies using the corporate agreement or not. (Schneider Dep. at 30.)

In January or February 1999, Joseph Bell, then TRI's president, met with Plantan, Souvignier, and Moss to discuss why Boise sales had dropped. (Compl. P 14; Boise Amended Answer P 15.) Souvignier does not recall any discussion or statement regarding why Honeywell had decided not to buy TRI products. (Souvignier Dep. at 112.) From October 1998 to the present, TRI has continued to sell products to Boise. (Thomas Dep. at 96.) TRI alleges that after and as a result of

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[7] Schneider does not believe that he told Plantan who the principal was who had sued Honeywell. (Schneider Dep. at 16.)

the October 20th telephone call from Schneider to Plantan, TRI's sales to Boise dropped from an average of $ 37,607 per month to an average of $ 20,148 per month. [*12] TRI has sold and continues to sell its products to Boise competitors and to end-users who are not Boise customers. TRI's sales of cartridges to Boise represents approximately 17% of TRI's revenues.

The highest total annual sales volume for TRI was in 1997, when TRI had approximately $ 3.1 million in sales. Total sales for TRI in 1998 were approximately $ 2.8 or 2.9 million; for 1999, they were approximately $ 2.3 million; and for 2000, they were approximately $ 1.3 million. (Thomas Dep. at 25.) In addition to its sales to Boise, TRI's sales fell off to three other major accounts from the 1997 time frame: 3M, Target, and Staples. (Thomas Dep. at 31.)

Analysis

I. Standard of Decision[8]

Summary judgment is proper if, viewing the record in the light most favorable to the nonmoving party, there is no

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[8] Boise filed its motion as a motion to dismiss or, in the alternative, for summary judgment. Under Federal Rule of Civil Procedure 12(b), where the Court considers matters outside the complaint, it shall convert a motion filed pursuant to Rule 12 (b) (6) to one for summary judgment under Rule 56, provided that the opposing party is given a reasonable opportunity to present all material information to allow the court to decide the motion. Fed. R. Civ. P. 12(b). Here, Plaintiff has submitted ample evidence in support of its claims. Accordingly, the Court will treat Boise's motion as one for summary judgment.

genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c). The moving party bears the burden of showing that the material facts in the case are undisputed. See Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Mems v. City of St. Paul, Dep't of Fire & Safety Servs., 224 F.3d 735, 738 (8th Cir. 2000). The court must view the evidence, and the inferences which may be reasonably drawn from it, in the light most favorable to the nonmoving party. See Graves v. Arkansas Dep't of Fin. & Admin., 229 F.3d 721, 723 (8th Cir. 2000); Calvit v. Minneapolis Pub. Schs., 122 F.3d 1112, 1116 (8th Cir. 1997).

The nonmoving party may not rest on mere allegations or denials, but rather must demonstrate the existence of specific facts that create a genuine issue for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); Krenik v. County of Le Sueur, 47 F . 3d 953, 957 (8th Cir. 1995). [*14] The court does not weigh facts or evaluate the credibility of affidavits and other evidence on a motion for summary judgment. See Liberty Lobby, 477 U.S. at 249. The nonmovant, however, cannot avoid summary judgment in favor of the movant merely by pointing to some alleged factual dispute between the parties. Instead, any fact alleged to be in dispute must be "outcome determinative under prevailing law," that is, it must be material to an essential element of the specific theory of recovery at issue. See Dancy v. Hyster Co., 127 F.3d 649, 652 (8th Cir. 1997); Get Away Club, Inc. v. Coleman, 969 F.2d 664, 666 (8th Cir. 1992).

II. The Federal Claims

A. Violation of 15 U.S.C. § 1 (against Honeywell and Boise)

Section 1 of the Sherman Act provides that

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

15 U.S.C.- §1.[9] To succeed on a section 1 claim, TRI must "provide proof of an illegal contract, combination, or conspiracy [*15] which results in an unreasonable restraint of trade." Double D. Spotting Serv., Inc. v. Supervalu, Inc., 136 F.3d 554, 558 (8th Cir. 1998), (citing State Oil Co. v. Khan, 522 U.S. 3, 118 S. Ct. 275, 279, 139 L. Ed. 2d 199 (1997)); see also Lamminen v. City of Cloquet, 987 F. Supp. 723, 733 (D. Minn. 1997) (Davis, J.).

> The Supreme Court in Monsanto Co. v. Spr y Rite Service Corp., 465 U.S. 752; 764 & 768, 104 S. Ct. 1464,. 79 L. Ed. 2d 775 (1984) and Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S.574, 588, 106 S. Ct . 1348, 89 L. Ed. 2d 538 (1986), provided the standard used to determine whether the plaintiff's evidence of a section 1 violation survives a summary judgment motion. In order to state a section 1 case, plaintiffs must present evidence that "tends to exclude the possibility of independent

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[9] TRI asserted antitrust claims against Boise and Honeywell under both the Sherman Act, 15 U.S.C. § 1, and Minnesota's antitrust statute, Minn. Stat. 325D.51. Minnesota anti-trust law is interpreted consistent with the federal court's construction of the Sherman Act. Lamminen v. City of Cloquet, 987 F. Supp 723, 734 (D. Minn. 1997) (Davis, J.) (citing State by Humphrey v. Road Constructors, Inc., 474 N.W.2d 224, 225 n. 1 (Minn. Ct. App. 1991)).

> action" by the defendants. Monsanto, 465 U.S. at 768, 104 S. Ct. 1464. This means that conduct that is "as consistent with permissible [activity] as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." Matsushita, 475 U.S. at 588, 106 S. Ct. 1348. [*16]

Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, 203 F.3d 1028, 1032 (8th Cir. 2000) (en banc). TRI asks that the existence of an agreement in restraint of trade be inferred from (1) the fact that Honeywell was a large and important customer of Boise's, (2) the October 20, 1998 telephone call from Honeywell to Boise in which Honeywell told Boise that it did not want to be supplied with toner cartridges from TRI under Boise's national contract, and (3) certain events that followed the October 20 telephone call. TRI argues that, from the foregoing, a reasonable inference can be drawn that Honeywell told Boise that it should take various actions to hurt TRI's business, including raising prices on TRI products to certain customers, excluding TRI from presentations, and failing to fill orders on TRI products ordered on a nation-wide basis.

While TRI is correct that a conspiracy cannot always be established by direct evidence and must, in some cases, be inferred from circumstantial evidence, TRI does not acknowledge that there are limits on what the Court can legitimately infer from circumstantial evidence. The lack of an economic motive for a conspiracy bears on the range of permissible conclusions to be drawn from ambiguous evidence. Where the defendants "had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." Matsushita, 475 U.S. at 596-97. The inference of conspiracy must be shown to be

"reasonable in light of the competing inferences of independent action." Id. at 588.

Ultimately, the Court cannot conclude that TRI's evidence "tends to exclude the possibility that the alleged conspirators acted independently." Matsushita, 475 U.S. at 588. TRI has failed to articulate a rational economic motive for Honeywell and Boise to injure TRI's sales. TRI's conspiracy argument essentially depends upon the premise that, if certain events occurred [*18] after the October 20 telephone call from Honeywell, they must have occurred because of the October 20 call. There is evidence, however, regarding each of Boise's allegedly harmful acts that is at least equally consistent with independent action. For example, the drop in Boise sales of TRI products in November 1998 appears dramatic. Comparing 1998 to prior years, however, demonstrates that similar drops occurred between October and November 1997, and October and November 1996. (See Iwan Aff. Ex. F.) Boise's failures to fill orders for TRI products from companies ordering from outside Minnesota are equally explainable as being attributable to the customers' access to stock keeping unit numbers ("SKUs") in Boise's central database, from which a customer may not be able to tell whether a product is available nationally or merely locally. As for customers TRI has identified as having been "lost" due to Boise's price increases, the only two customers TRI has named stopped buying all office products -- not just TRI cartridges -- from Boise. (See Aff. of Elizabeth Grady, PP 29, 30.)

The Court concludes that TRI has failed to establish a central element of its section 1 claim [*19] -- an agreement to act in restraint of trade. Accordingly, the Court finds it unnecessary to consider the parties' arguments concerning other elements of the section 1 claim, such as whether the alleged wrongful

conduct constitutes a per se violation or is subject to the rule of reason, or whether TRI has come forward with sufficient evidence of antitrust injury to give rise to a genuine issue of material fact on that issue.[10] The antitrust claims against Boise and Honeywell will be dismissed.

B. Impairment of contract in violation of 42 U.S.C. § 1981 (against Honeywell)

Section 1981 provides that

> All persons within the jurisdiction of the United [*20] States shall have the same right in every State and Territory to make and enforce contracts . . . .

42 U.S.C. § 1981(a). TRI specifically alleged that Honeywell "engaged in purposeful racial discrimination against TRI, through interference with TRI's contractual relationship with Boise and with TRI's right to the enjoyment of all benefits, privileges, terms, and conditions of its contractual relationship with Boise." (Compl. P 16.) TRI's theory of liability has changed, however. In opposition to summary judgment, TRI does not contend that Honeywell's actions were motivated by a discriminatory animus against TRI, but rather were motivated by a desire to "retaliate" against Joseph Thomas, an African-American owner of TRI and former employee of Honeywell, for having previously sued Honeywell alleging racial discrimination.

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[10] The Court has serious reservations about TRI's ability to establish a per se violation of section 1 of the Sherman Act on a theory of price fixing. The Court also concludes that TRI has failed to establish an injury to competition; TRI's theory that its product is "unique" is not borne out by the record before the Court.

There are two problems with TRI's "retaliation" theory. First, TRI did not plead a claim of retaliation. It has only alleged that Honeywell's actions were motivated by the fact that TRI was a minority-owned business. (See generally Compl. P 16, 17, 19, 22.) In the context of construing EEOC charges, the Eighth Circuit has repeatedly [*21] held that a claim of race discrimination is separate and distinct from a claim of retaliation. Williams v. Little Rock Munic. Water Works, 21 F.3d 218, 223 (8th Cir. 1994); see also Kells v. Sinclair Buick-GMC Truck, Inc., 210 F.3d 827, 837 (8th Cir. 2000); Artis v. Francis Howell North Band Booster Ass'n, Inc., 161 F.3d 1178, 1183 (8th Cir. 1998). The Court concludes that, similarly, where a minority-owned business asserts a claim of discrimination under § 1981, a claim based upon retaliation is conceptually and fundamentally different from a claim based upon a discriminatory animus against the corporation as a minority business.

Honeywell objects that it has been prejudiced by TRI's eleventh-hour change in legal theory. The retaliation claim certainly is beyond the scope of the Complaint. TRI appears to have had knowledge of the basis for a "retaliation" theory at the time it filed suit in that Joseph Thomas testified that he was told by Souvignier that Honeywell did not want to do business with TRI because of him. Honeywell has not had adequate notice of the claim. Therefore, the Court will not permit TRI to assert retaliation [*22] at this late stage in the litigation.

Even if TRI were allowed to proceed with a "retaliation" claim, such a claim lacks an adequate basis in the law. TRI has cited case law holding that (1) a corporation may sue under § 1981 where it is injured by racial prejudice directed at a corporate employee, and (2) a retaliation claim under § 1981 will lie where a former employer takes an "adverse

employment action" against its former employee (e.g., failing to rehire him or failing to provide references). See Carr v. Health Ins. Plan of Greater New York, Inc., 2001 U.S. Dist. LEXIS 6766, No. 99 CV 3706, 2001 WL 563722, at *2 (S.D.N.Y. May 24, 2001); Rosales v. AT&T Information Sys. Inc., 702 F. Supp. 1489 (D. Colo. 1988). From these two holdings, TRI asserts that a corporation may recover under § 1981 from a company that is the former employer of a corporate owner, officer, or director, where that company refuses to contract with the corporation due to racial discrimination litigation that the former employee had pursued against the former employer.

As a threshold matter, the Court is concerned that it is not TRI itself that engaged in any "protected activity"; rather, the [*23] "protected activity" TRI asserts is attributable to a shareholder of the company. The Court further observes that the district court in Carr had reservations about the rule of law it was applying. The Carr court expressed serious concerns about "extending the scope of an 'adverse employment action' to include a failure to rehire an individual in litigation with his former employer," because "such a rule creates a worrisome opportunity for the manufacture of frivolous claims." Carr, 2001 U.S. Dist. LEXIS 6766, 2001 WL 563722 at *3. The Carr court further noted that "the very existence of litigation between an individual and his former employer indicates that a serious breakdown in that relationship has occurred." Id. The Court has grave concerns about a rule of law requiring a former employer to contract with a company owned by a former employee who has sued under a civil rights statute and lost. In the absence of binding Eighth Circuit authority compelling such a result, the Court declines to create such a rule.

Returning, to the § 1981 claim as pleaded in the Complaint -- racial., discrimination against TRI -- such claims are generally evaluated on summary judgment under a [*24] McDonnell Douglas burden-shifting analysis.[11] See Bogren v. Minnesota, 236 F.3d 399, 409 (8th Cir. 2000) ; Meyers v. Ford Motor Co., 659 F.2d 91, 93 (8th Cir. 1981). Under this burden-shifting analysis, the plaintiff must articulate a prima facie case of racial discrimination. Once a prima facie case has been presented, the burden shifts to the defendant to articulate a legitimate non-discriminatory reason for the complained-of conduct. As the Eighth Circuit has recently explained:

> Once the defendant produces evidence of a reason other than discrimination for the adverse employment action, "the McDonnell Douglas framework," with its burdens and presumptions, disappears, and the only remaining issue is "discrimination vel non." . . . If the plaintiff adduces evidence that the [defendant's] proffered reason is false, both the prima facie case and the evidence of pretext are relevant on this ultimate question, and they may suffice to sustain a finding of intentional discrimination. . . . However, proof that "the [defendant's) proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's [*25] proffered reason ... is correct."

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[11] The burden-shifting analysis applies in the absence of direct evidence of racial discrimination. Plaintiff does not argue the existence of such direct evidence, and the Court concludes upon a review of the record, that there is no such direct evidence here.

Cha v. Henderson, 258 F.3d 802, 805 (8th Cir. 2001) (internal citations to Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) omitted).

The Court assumes arguendo that TRI can establish a prima facie case of racial discrimination against the company. The Court also concludes that Honeywell has articulated a non-discriminatory reason for its decision not to purchase from TRI. Honeywell has presented evidence that Schneider recommended that Honeywell not purchase products from TRI through Boise in light of prior litigation between Honeywell and one of the principal shareholders of TRI, Joseph Thomas, a former Honeywell employee. [*26] Honeywell had placed Thomas on a six-month leave of absence in 1990 and thereafter terminated him following (1) an internal investigation into allegations by a female co-employee (with whom Thomas had been involved in a romantic relationship) of verbal and physical abuse by Thomas, and (2) Thomas's failure to comply with remedial measures established by Honeywell's Human Resources department. Thomas v. Honeywell, Inc., 1994 Minn. LEXIS 923, No. C8-94-29, 1994 WL 495087 at * 1 (Minn. Ct. App. Sept. 13, 1994). Thomas sued Honeywell alleging that he had been discharged on the basis of his race and had been defamed.[12] Id. The trial court granted Honeywell summary judgment on Thomas's racial discrimination claim because Thomas failed to make out a prima facie case of race discrimination; that decision was affirmed by the court of appeals on a de novo review. Id. at *6. Thomas also appealed from a judgment of dismissal on his defamation claim, which ruling was also affirmed. Id. at *1-5. Honeywell's litigation with Thomas lasted over three-and-a-half years.

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[12] Plaintiff's counsel in this lawsuit also represented Thomas in his lawsuit against Honeywell.

The Court finds that Thomas has not come forward with sufficient evidence from which a jury could determine that Honeywell's stated reason for not wanting to do business with TRI -- its prior experience with Thomas -- was a pretext for racial discrimination against TRI as a minority-owned business. Accordingly, summary judgment on the § 1981 claim is proper.

III. State Law Claims (against Honeywell)

A. Business Discrimination (Minn. Stat. § 363.03, subd. 8a(c))

Section 363.03, subdivision 8a(c), of the Minnesota Statutes provides that:

> It is an unfair discriminatory practice for a person engaged in a trade or business or in the provision of a service . . . to intentionally refuse to do business with, to refuse to contract with, or to discriminate in the basic terms, conditions, or performance of the contract because of a person's race, color, sex, sexual orientation, or disability, unless the alleged refusal or discrimination is because of a legitimate business purpose.

Minn. Stat. § 363.03, subd. 8a (c). person, for purposes of the Minnesota Human Rights Act, includes partnerships, corporations, and other business organizations. Minn. Stat. § [*28] 363.01, subd. 28.

As a threshold matter, Honeywell raises a statute of limitations defense to this claim. MHRA has a one-year statute of limitations. Minn. Stat. 363.06, subd. 3. TRI commenced this lawsuit in June 2000. Honeywell argues that

the allegedly discriminatory acts TRI complains of occurred between October 1998 and January 1999. Furthermore, Honeywell argues, TRI certainly knew about the facts underlying the claim -- Honeywell's decision not to buy TRI products -- no later than January 1999. Therefore, TRI brought its claim about five months too late.

TRI responds that the telephone call from Honeywell is not the date the cause of action accrued because it was only "the beginning of an agreement between Honeywell and Boise, initiated by Honeywell, to harm TRI." (Pl.'s Mem. Opp'n to Mots. for Summ. J. at 32.) In an ambitious stretch of inferences, TRI argues that Boise's ability to retain its contractual relationship with Honeywell was contingent upon Boise carrying out the parties' agreement to harm TRI. TRI's reasoning is as follows:

- Honeywell was a significant customer of Boise;

- Honeywell "used its clout" to tell Boise that it did not want TRI's [*29] products distributed within Honeywell (and -- TRI asks the Court to infer -- to anyone else);

- Boise "did as it was told," no longer promoting TRI's products with the same vigor as it had before the telephone call from Honeywell, raising prices on products, telling TRI's "major" customers that its products were unavailable, etc.; and

- The manager who received the telephone call from Honeywell about not purchasing product from TRI (who is also the manager who signed the national contract with Honeywell) accepted a "supplier of the

year" award from Honeywell in 1999 on behalf of Boise.

The inferences proposed by TRI are simply not reasonable in light of the undisputed facts that (1) Boise continued to sell TRI product after October 1998, and (2) Boise's monthly sales of TRI product in July, August, and September 1999 -- about nine months after the telephone call from Honeywell -- were only slightly below the $ 30,000 per month level they had been at in October 1998. No jury could reasonably draw the inferences from that evidence that TRI has urged upon the Court. The cause of action clearly accrued no later than January 1999 and, therefore, the MHRA claim will be[*30] dismissed on statute of limitations grounds.

B. Tortious interference with contract

Under Minnesota law, a claim for tortious interference with contract involves the following essential elements: (1) the existence of a contract; (2) knowledge of the contract; (3) intentional procurement of the contract's breach; (4) absence of justification; and (5) damages caused by the breach. See Furlev Sales & Assoc., Inc. v. North Am. Auto. Warehouse, Inc., 325 N.W.2d 20, 25 (Minn. 1982). TRI alleged in its Complaint that Honeywell "was aware of TRI's contract with Boise for the marketing and distribution of TRI's products," and intentionally and wrongfully procured the breach of the contract. At the hearing on the defendants' motions, however, TRI's counsel's confirmed that no breach of contract has been asserted against Boise. Nor does it appear from the uncontroverted facts that Boise ever ceased marketing or distributing TRI's products. TRI has not established an essential element of its tortious interference with contract claim. That claim will be dismissed.

C. Tortious interference with prospective business relationships

To establish a claim of tortious [*31] interference with a prospective business relationship, a plaintiff must prove the defendant intentionally committed a wrongful act which improperly interfered with the prospective relationship." Hunt v. University of Minn., 465 N.W.2d 88, 95 (Minn. App. 1991) (citing United Wild Rice, Inc. v. Nelson, 313 N.W.2d 628, 633 (Minn. 2982)). "Without evidence that a defendant's wrongful conduct influenced a prospective customer's decision to enter into a contract, summary judgment is appropriate." Sports & Travel Marketing, Inc. v. Chicago Cutlery Co. 8.11 F. Su . 1372, 1382 (D. Minn. 1993) (Doty, J.).

TRI contends that it had a strong relationship, good reputation, and history of doing business with Boise which had brought about excellent opportunities with Boise to enter into national contracts. TRI argues that there was an abrupt charge in its relationship with Boise after Honeywell's telephone call and that, after the call, Boise took adverse actions against TRI. TRI has not, however, identified any companies that might have bought TRI's products through Boise but did not do so due to Honeywell's telephone call to Boise. Nor is there [*32] any evidence that Honeywell knew about such potential business relations. As TRI has failed to come forward with evidence relating to any prospective customer who was influenced by Honeywell's conduct not to enter into a contract, summary judgment on this claim is appropriate.

Conclusion

Based on the foregoing, and all of the files, records and proceedings herein, IT IS ORDERED THAT

1. Defendant Honeywell, Inc.'s Motion for Summary Judgment (Doc. No. 15) is GRANTED.

2. Defendant Boise Cascade Office Products, Inc.'s Motion to Dismiss or, in the Alternative, for Summary Judgment (Doc. No. 20) is GRANTED.

3. The Plaintiff's Complaint is DISMISSED WITH PREJUDICE in its entirety.

42 USCS § 1981 UNITED STATES CODE SERVICE
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*** CURRENT THROUGH P.L. 108-17, APPROVED 4/23/03 *** *** WITH A GAP OF 108-15 ***

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21. CIVIL RIGHTS GENERALLY
GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION 42 USCS § 1981 (2003)

1981. Equal rights under the law

(a) Statement of equal rights. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined. For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment. The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

15 USCS § 1
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TITLE 15. COMMERCE AND TRADE
CHAPTER 1. MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE
15 USCS § 1 (2003)

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $ 10, 000, 000 if a corporation, or, if any other person, $ 350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

USCS Fed Rules Civ Proc R 37 UNITED STATES CODE SERVICE
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*** CURRENT THROUGH CHANGES RECEIVED MARCH, 2003 ***

FEDERAL RULES OF CIVIL PROCEDURE

V. DEPOSITIONS AND DISCOVERY

Fed Rules Civ Proc R 37 (2003)
Review expert commentary from The National Institute for Trial Advocacy Review Court Orders which may amend this Rule.

Rule 37. Failure to Make or Cooperate in Discovery; Sanctions

(a) Motion for Order Compelling Disclosure or Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows:

(1) Appropriate Court. An application for an order to a party shall be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the district where the discovery is being, or is to be, taken.

(2) Motion.

(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification

that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30 (b) (6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(3) Evasive or Incomplete Disclosure, Answer, or Response. For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(4) Expenses and Sanctions.

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in

making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorneys fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to comply with order.

(1) Sanctions by Court in District Where Deposition is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on

behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit. (1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring

payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37 (b) (2) (A),(B), and (C) and may include informing the jury of the failure to make the disclosure.

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (A) the request was held objectionable pursuant to Rule 36(a), or (B) the admission sought was of no substantial importance, or (C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (D) there was other good reason for the failure to admit. (d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b) (2) of this rule. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that the

movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c). (e) [Abrogated]

(f) [Repealed)

(g) Failure to Participate in the Framing of a Discovery Plan. If a party or a party's attorney fails to participate in the development and submission of a proposed discovery plan as required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.